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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Plaintiff and Appellant, v. HOWARD LEE RANDOL, JR., Defendant and Respondent.	B232597 (Los Angeles County Super. Ct. No. GC042466)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph De Vanon, Judge. Affirmed and remanded.

Philip Werner; Law Office of Stephen M. Tamchin, for Appellant.

Law Offices of Bruce W. Atwell and Bruce W. Atwell, for Respondent.

Universal Underwriters Insurance Company appeals from the trial court's order setting aside the default judgment entered against Howard Lee Randol, Jr. We affirm.

FACTS AND PROCEEDINGS

Because this is an appeal from the trial court's order setting aside a default judgment, we rely on the allegations of appellant's complaint for a description of the underlying events. Appellant Universal Underwriters Insurance Company insured a building in Pasadena. The building's owner hired respondent Howard Lee Randol, Jr.'s roofing company to replace the roof on the building. While working on the roof, respondent's company accidentally set fire to the building. Appellant paid the building's owner for the damage to the building under the owner's insurance policy with appellant. Appellant then sued respondent to recover the approximately half-million dollars appellant had paid the building's owner because of respondent's fire.

About eight months after filing the complaint, appellant informed the court that appellant could not locate respondent to personally serve him with the summons and complaint. In November 2009, the court ordered service on respondent by publication in Los Angeles County. Respondent did not appear in response to the publication. In February 2010, the clerk of the trial court entered respondent's default and on April 20, 2010, the trial court entered judgment for appellant in the amount of $581,287.43 in damages, interest, and costs.

On July 12, 2010, the Orange County Recorder's Office mailed to respondent a copy of the abstract of judgment entered against him in the Los Angeles proceeding. The recorder's office mailed the abstract of judgment to the Orange County home of respondent's wife, with whom respondent did not live. Sometime after receiving the letter, respondent's wife forwarded it unopened to respondent, who was living in Colorado.

Respondent received the forwarded letter sometime between July and September 2010. Believing the letter related to his May 2010 purchase of a home in Orange County,

respondent did not immediately open the letter upon its receipt. Instead, he opened it sometime in mid-September.

After opening the letter, respondent conferred on September 20, 2010, with attorney James Hornbuckle. On September 22, 2010, attorney Hornbuckle called appellant's attorney, Philip Werner, to ask appellant to stipulate to setting aside the default judgment, but Hornbuckle did not reach Werner on the phone. On September 27, Werner left a voice message returning Hornbuckle's call, and on September 28 the two attorneys spoke. Werner told Hornbuckle that a third lawyer was handling the matter. Werner said he would get the third lawyer to call Hornbuckle. When Hornbuckle did not hear from the other attorney, Hornbuckle called Werner twice more, on November 12, 2010, and January 3, 2011, seeking a stipulation to set aside the judgment. During the January 3 call, Werner told Hornbuckle that the other attorney was unlikely to agree to set aside respondent's default. Two days later on January 5, respondent retained attorney Robert Johnson who filed a motion to set aside the default judgment on January 7. Following a hearing, the trial court granted the motion on the grounds that respondent had not received actual notice of the complaint, and service by publication had occurred in Los Angeles County, a county in which respondent did not live. This appeal followed.

DISCUSSION

We review for abuse of discretion a trial court's order setting aside a default judgment. (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 862.) According to appellant, respondent did not explain why he took 179 days to file his motion on January 7, 2011, after the Orange County Recorder mailed the abstract of judgment to him on July 12, 2010. As the moving party, respondent was obligated to act diligently in setting aside his default. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181; *Goya v. P.E.R.U. Enterprises* (1978) 87 Cal.App.3d 886, 890 (*Goya*).) Appellant contends the court abused its discretion because respondent did not move within a reasonable time

after learning his default had been entered. Thus, appellant concludes, the court as a matter of law lacked authority to set aside the default. We disagree.

Evidence must exist in the record that would reasonably permit the trial court to find respondent acted diligently. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 528; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1181.) Diligence depends on the circumstances. (*Benjamin*, at p. 528; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) Here, respondent filed several supporting declarations from his wife, attorneys, and himself describing a tale involving his living out of state, unopened mail forwarded to him from his wife in California the significance of which he did not understand, and his attorney's rebuffed attempts to reach out to appellant's counsel in the hope of stipulating to a mutually-agreed solution. The trial court resolves conflicts in the evidence regarding those circumstances. (*Goya, supra,* 87 Cal.App.3d at p. 891.) And the trial court determines if those facts and circumstances show diligence. (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905.)

In setting aside the default, the trial court presumably found respondent's delay in opening the letter from the Orange County Recorder was reasonable given his ignorance of appellant's lawsuit coupled with his mistaken assumption that the letter involved his purchase of a home in Orange County earlier in the year. (Compare *Davis v. Thayer, supra,* 113 Cal.App.3d at pp. 906-907 [party not diligent in refusing to read what he *knew* was a complaint].) Furthermore, the court presumably found the effort by respondent's counsel Hornbuckle to broker a stipulation to set aside the default was a reasonable attempt to avoid the attorney's fees and costs of a formal motion to the court. (Compare *Iott v. Franklin* (1988) 206 Cal.App.3d 521, 531 [suggesting no lack of diligence where counsel's phone calls and letters unsuccessful rather than unanswered].) Appellant argues for contrary findings from the foregoing circumstances in support of its contention that respondent was not diligent in moving to set aside the default. In doing so, however, appellant asks us to reweigh the evidence, which we may not do. (*Goya, supra,* 87 Cal.App.3d at p. 891 [trial court resolves conflicts in the evidence].)

Appellant misreads *Benjamim v. Dalmo Mfg. Co., supra,* 31 Cal.2d 523 as creating a bright-line rule that taking more than 90 days to move to set aside a default is, as a matter of law, not diligent. *Benjamin* stated no such rule. Instead, it held that whatever the delay's length, the moving party must explain the reasons for the delay and a failure to explain the delay precludes the court from setting aside the default. (*Id.* at p. 528; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1421 [lack of evidence explaining delay was "key" to *Benjamin's* analysis whether moving party acted diligently]; *Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521, 1525 [reason for delay of more than three months must be explained].) Because respondent explained his delay to the trial court's satisfaction, we find no abuse of discretion in the court setting aside the default.

Appellant also contends the court erred because respondent's motion did not establish that respondent had a meritorious defense to appellant's complaint. Code of Civil Procedure section 473.5, under which the court set aside respondent's default, requires that the moving party file a copy of the answer the defendant proposes to file if the court sets aside the default. (Code Civ. Proc., § 473.5, subd. (b) ["The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action."].) Respondent filed his answer with his motion to set aside his default, thus satisfying the plain statutory language.

Appellant cites, however, the Judicial Council comment to section 473.5, which states that the defendant must show he has "has a meritorious defense" in order for the court to grant the motion. Appellant also cites *Goya, supra,* 87 Cal.App.3d at page 891for the proposition that the moving party must have a meritorious defense. From the comment and *Goya,* appellant argues the trial court must weigh and assess the veracity of the allegations in respondent's proposed answer. No published decision since *Goya* has cited it for the proposition appellant urges, and the Judicial Council comment does not so state. Indeed, the law is to the contrary. As *Tunis v. Barrow* (1986) 184 Cal.App.3d 1069 explains, "While a defendant moving for relief from a default judgment is required to serve and file a copy of his proposed answer with the motion (Code Civ. Proc.,

§ 473.5, subd. (b)), hearing on the motion is not the occasion to try the merits of the action. [Citations.] 'The court's inquiry is limited to whether the . . . pleading contains a statement of facts sufficient to constitute a meritorious case, and the truth concerning the meritorious defense is not at issue.' [Citation.]" (*Tunis* at p. 1080.)

Appellant's reliance to the contrary on *Beard v. Beard* (1940) 16 Cal.2d 645, 648 is misplaced. *Beard* involved a superseded version of Code of Civil Procedure section 473 in effect in 1940 covering an attorney's default by inadvertence or excusable neglect. Former section 473 required a moving party to file a verified pleading or affidavit to show its defense was meritorious. But that requirement involves a different statute and a different time which have no bearing here. "In 1981 [the California Legislature] amended section 473 to specifically provide that no affidavit or declaration of merits need be provided by a party moving for relief thereunder." (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 787-789.)

DISPOSITION

The order setting aside the default judgment is affirmed and the matter is remanded for further proceedings. Respondent to recover his costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.